APPENDIX A

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 513—August Term, 1993

(Argued: November 17, 1993 Decided: January 25, 1994)

Docket No. 93-7188

SHARON KARIBIAN,

Plaintiff-Appellant,

-v-

COLUMBIA UNIVERSITY, JOHN BORDEN,

Defendants-Cross-Claimants-Appellees,

-v-

MARK URBAN,

Defendant-Cross-Defendant-Appellee.

Before:

MAHONEY, MCLAUGHLIN AND HEANEY*,

Circuit Judges.

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* Honorable Gerald W. Heaney, of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Sharon Karibian appeals from a judgment entered in the United States District court for the Southern District of New York (Griesa, *C.J.*) granting summary judgment to Columbia University and dismissing Karibian's sexual harassment complaint. The district court held that Columbia could not be liable either (1) under a *quid pro quo* theory unless Karibian could prove actual economic loss, or (2) under a hostile work environment theory unless Columbia had notice of the harassment or provided no reasonable avenue for complaint.

REVERSED and REMANDED.

ELIZABETH L. KOOB, New York, NY (Joan Magoolaghan, Cara Cherry, Law Student, Koob & Magoolaghan, New York, NY, of counsel), *for Plaintiff-Appellant.*

DIANE S. WILNER, New York, NY (Lee S. Gayer, Joel B. Rothman, Wilner & Associates, P.C., of counsel), *for Defendants-Appellees Columbia University and John Borden.*

KAREN M. MORAN, Washington, D.C. (James R. Neely, Jr., Deputy General Counsel, Gwendolyn Young Reams, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, United States Equal Employment Opportunity Commission Office of General Counsel, of counsel), *for the Equal Employment Opportunity Commission as amicus curiae.*

Clifford M. Solomon, Corwin Solomon & Tanenbaum, P.C., New York, NY, *for Defendant-Cross-Defendant-Appellee Mark Urban.*

Isabelle Katz Pinzler, Sara L. Mandelbaum, Women's Rights Project, American Civil Liberties Union, Ellen J. Vargyas, Deborah L. Brake, National Women's Law Center, submitted an amici curiae brief for the Women's Rights Project of the ACLU and the National Women's Law Center on behalf of Plaintiff-Appellant.

McLAUGHLIN, *Circuit Judge:*

Sharon Karibian appeals from a judgment entered in the United States District Court for the Southern District of New York (Thomas P. Griesa, *Chief Judge*) granting summary judgment to defendants Columbia University and John Borden, and dismissing Karibian's complaint of employment discrimination. Karibian's complaint alleged that sexual harassment committed by her supervisor, defendant Mark Urban, constituted discrimination by Columbia on the basis of sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), and section 296 of New York's Executive Law. Karibian additionally alleged various state law tort claims against Columbia, Borden and Urban.

In the district court, Karibian proceeded under both available theories of sexual harassment: *quid pro quo*, and hostile work environment. In granting summary judgment to defendants, the district court held that Columbia could not be liable under a *quid pro quo* theory because Karibian failed to prove any actual economic loss resulting from Urban's harassment. On her hostile work environment theory, the court held that Columbia was not liable to Karibian because it did not have notice of Urban's harassment and had provided a reasonable avenue for harassment complaints. *Karibian v. Columbia Univ.*, 812 F. Supp. 413 (S.D.N.Y. 1993).

We conclude that the district court erred in requiring Karibian to demonstrate actual economic loss to prove *quid pro quo* sexual

harassment. We also conclude that the court failed to apply the proper legal standard to determine an employer's liability for the hostile work environment created by a supervisor. Accordingly, we reverse and remand for further proceedings.

BACKGROUND

In 1987, while a student in Columbia University's General Studies Program, Sharon Karibian worked in Columbia's fund raising "Telefund" office. Telefund was administered for Columbia by an independent contractor, Philanthropy Management Company ("PMI"), and was staffed by both PMI and Columbia employees. Karibian was an employee of Columbia. The Telefund office operated under the aegis of Columbia's "University Development and Alumni Relations" office ("UDAR").

In September 1987, Columbia appointed defendant Mark Urban as Development Officer for Annual Giving at UDAR. In that capacity, Urban had supervisory authority over Telefund, and, consequently, over Karibian. Specifically, Urban had the authority to alter Karibian's work schedule and assignments, and to give her promotions and raises (subject to approval). In addition, Urban had at least the apparent authority to fire Karibian.

This case involves Urban's alleged conduct towards Karibian while the two were employees of Columbia. Urban conceded that he and Karibian had a sexual relationship while he was her supervisor; however, the nature of that relationship — *i.e.*, whether consensual or coercive — remains hotly disputed. We limit our discussion to Karibian's version of events.

While working at UDAR, Urban "pursued" Karibian by repeatedly inviting her out to bars, ostensibly to discuss work-related matters. On those occasions, Urban often asked Karibian back to his apartment. Initially, Karibian rebuffed Urban's advances; ultimately, however, she yielded to pressure from Urban.

Specifically, Karibian claimed that Urban coerced her into a violent sexual relationship by telling her that she "owed him" for all he was doing for her as her supervisor. Karibian also claimed that the conditions of her employment — including her raises, hours, autonomy and flexibility — varied from time to time, depending on her responsiveness to Urban. Karibian stated that she believed she would be fired if she did not give in to Urban's demands.

At first, Karibian told no one about her relationship with Urban. After some time, however, Karibian contacted two counselors at Columbia. In September 1988, Karibian contacted Columbia's Panel on Sexual Harassment, and met with Panel member Mary Murphy. Karibian told Murphy that she was afraid her boss would retaliate against her if she stopped sleeping with him. Shortly thereafter, Karibian met with Columbia's Equal Opportunity Coordinator, Ruth Curtis. At Karibian's request, both meetings were held confidential, and neither resulted in any investigation of Urban. According to Karibian, both Murphy and Curtis discouraged her from actively pursuing a complaint against Urban.

In April 1989, Karibian came to work upset and told her immediate Telefund supervisor, Loren Spivack, of a particularly violent sexual encounter with Urban. Spivack, a PMI employee, notified PMI's president, Ron Erdos. Neither Spivack nor Erdos informed anyone at Columbia about the incident.

Around July of 1989, Karibian applied for the position of Annual Giving Development Officer at Columbia. Columbia did not immediately consider Karibian for the position because Urban delayed forwarding her resume to the personnel department. Although Columbia eventually considered Karibian's application, she did not get the job. About the same time, Karibian applied for and received a promotion to the position of Project Director, the highest position within Telefund. As Project Director, Karibian reported directly to Urban at UDAR.

In January 1990, Karibian complained to Gertrude de la Osa, the Director of Development Services at UDAR, that she was afraid of being fired by Urban and that Urban was "sabotaging" her at Telefund. De la Osa brought Karibian's complaint to the attention of UDAR's Deputy Vice President, defendant John Borden. Around the same time, Karibian met again with Ruth Curtis; this time, Karibian dropped her request for confidentiality and gave Curtis permission to speak to others at Columbia about her troubles with Urban.

At this point, Columbia took steps to resolve the problem. Borden asked Urban to write a chronology of his relationship with Karibian, and removed him from direct supervisory authority over Karibian. (According to Urban's chronology, his relationship with Karibian was entirely consensual.) Without crediting either Karibian's or Urban's characterization of their relationship, Columbia forced Urban to resign — for reasons that remain somewhat vague. In August 1990, Columbia closed the Telefund office and Karibian was laid off.

Karibian then brought this suit against Columbia, Borden and Urban, claiming that Urban's sexual harassment violated Title VII. Following discovery, the district court granted defendants' motion for summary judgment.

The court began its analysis by recognizing that Title VII encompasses two theories of sexual harassment: *quid pro quo*, and hostile work environment. 812 F. Supp. at 416. Rejecting Karibian's *quid pro quo* claim, the court ruled that this theory requires proof of "actual — rather than threatened — economic loss because of gender or because a sexual advance was made and rejected." *Id.* Because Karibian had not suffered any economic detriment during her relationship with Urban — in fact, she had been promoted and had received pay raises during the relevant time — the court ruled that Karibian had no valid claim for *quid pro quo* harassment. *Id.*

The district court also rejected Karibian's hostile work environment theory. Relying on *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59 (2d Cir. 1992), the court held that Karibian "must prove 'that the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it.'" 812 F. Supp. at 416 (*quoting Kotcher*, 957 F.2d at 63). Applying this standard, the court ruled that (1) Columbia provided a reasonable avenue for making complaints, and (2) once Columbia got actual notice of Urban's misconduct in 1990, it promptly took adequate curative measures. On the latter point, the court rejected Karibian's argument that her confidential disclosures to Murphy and Curtis were sufficient to put Columbia on notice of Urban's harassment. The court also rejected Karibian's alternative argument that notice to her supervisors at PMI, an independent contractor, constituted notice to Columbia. Having disposed of Karibian's federal claim, the court went on to dismiss Karibian's pendent state law claims for lack of jurisdiction.

Karibian now appeals.[1]

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[1] In the district court, Karibian also alleged that Columbia closed the Telefund office in retaliation for Karibian's sexual harassment complaint. *See* 812 F. Supp. at 417. In her main brief on appeal, Karibian does not argue the point separately. Rather, Karibian simply characterizes the "premature" closing of the Telefund office as "retaliatory" in the context of her argument that Columbia's complaint procedures were inadequate.

We have no obligation to review issues that are raised, but not independently and sufficiently developed, in an appellant's main brief. *See Freeman United Coal Mining Co. v. OWCP*, 957 F.2d 302, 305 (7th Cir. 1992). We conclude that for purposes of appeal, Karibian has forfeited — if not abandoned — any independent claim she may have had for retaliatory discharge by subsuming that argument within her hostile work environment argument. *See, e.g., Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 362 (1st Cir. 1989).

DISCUSSION

By its terms, Title VII prohibits discrimination on the basis of sex with respect to the "compensation, terms, conditions, or privileges" of employment. 42 U.S.C. § 2000e-2(a)(1)(1988). Although neither the statute nor its legislative history fleshes out the meaning of this sweeping prohibition, it is now established law that sexual harassment in the work place violates "Title VII's broad rule of work place equality." *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 371 (1993). While the law of sexual harassment continues to develop at a brisk pace, a plaintiff seeking relief for sexual harassment may presently proceed under two theories: (1) *quid pro quo*, and (2) hostile work environment. *See Meritor Sav. Bank, FSB v. Vinson*, 477, U.S. 57, 64-65 (1986); *Kotcher*, 957 F.2d at 62. Karibian believes that Urban's harassment fits both paradigms; and we address each in turn.

I. *Karibian's Quid Pro Quo Claim*

Under the Guidelines established by the Equal Employment Opportunity Commission ("EEOC"), *quid pro quo* harassment occurs when "submission to or rejection of [unwelcome sexual] conduct by an individual is used as the basis for employment decision affecting such individuals." 29 C.F.R. § 1604.11(a)(2)(1993). *See also Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 577 (2d Cir. 1989). Accordingly, to establish a *prima facie* case of *quid pro quo* harassment, a plaintiff must present evidence that she was subject to unwelcome sexual conduct, and that her reaction to that conduct was then used as the basis for decisions affecting the compensation, terms, conditions or privileges of her employment. *See Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988); *Highlander v. K.F.C. Nat'l Mgmt. Co.*, 805 F.2d 644, 648 (6th Cir. 1986); *Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982).

Because the *quid pro quo* harasser, by definition, wields the employer's authority to alter the terms and conditions of employment — either actually or apparently — the law imposes strict liability on the employer for *quid pro quo* harassment. *See Kotcher*, 957 F.2d at 62 ("The supervisor is deemed to act on behalf of the employer when making decisions that affect the economic status of the employee."); *Carrero*, 890 F.2d at 579 ("[T]he harassing employee acts as and for the company, holding out the employer's benefits as an inducement to the employee for sexual favors.").

Karibian argues that the district court erred when it required her to present evidence of actual, rather than threatened, economic loss in order to state a valid claim of *quid pro quo* sexual harassment. We agree. There is nothing in the language of Title VII or the EEOC Guidelines to support such a requirement. *See Meritor*, 477 U.S. at 64 ("[T]he language of Title VII is not limited to 'economic' or 'tangible' discrimination.").

True, in the typical *quid pro quo* case, the employee who refuses to submit to her supervisor's advances can expect to suffer some job-related reprisal. *See, e.g., Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 142 (2d Cir. 1993). Accordingly, in such "refusal" cases, evidence of some job-related penalty will often be available to prove *quid pro quo* harassment. But that is not to say that such evidence is always essential to the claim. In the nature of things, evidence of economic *harm* will not be available to support the claim of the employee who *submits* to the supervisor's demands. *Lipsett*, 864 F.2d at 913; *see, e.g., Showalter v. Allison Reed Group, Inc.*, 767 F. Supp. 1205, 1212 (D.R.I. 1991). The supervisor's conduct is equally unlawful under Title VII whether the employee submits or not. Under the district court's rationale, only the employee who successfully resisted the threat of sexual blackmail could state a *quid pro quo* claim. We do not read Title VII to punish the victims of sexual harassment who surrender to unwelcome

sexual encounters. Such a rule would only encourage harassers to increase their persistence.

The relevant inquiry in a *quid pro quo* case is whether the supervisor has linked tangible job benefits to the acceptance or rejection of sexual advances. It is enough to show that the supervisor used the employee's acceptance or rejection of his advances as the basis for a decision affecting the compensation, terms, conditions or privileges of the employee's job. *See, e.g., Showalter*, 767 F. Supp. at 1212 ("The obvious tangible job benefit the plaintiffs received for succumbing to the harassment was the retention of their employment."). In this case, Karibian stated that her work assignments, raises and promotions depended on her continued responsiveness to Urban's sexual demands. In addition, Karibian claimed that Urban implicitly threatened to fire her and to damage her career if she did not comply. If true, Urban's conduct would constitute *quid pro quo* harassment because he made and threatened to make decisions affecting the terms and conditions of Karibian's employment based upon her submission to his sexual advances.

In support of an "actual economic loss" requirement, Columbia relies on isolated language from the *Kotcher* and *Carrero* cases, *supra*, decided by this Court. In *Kotcher*, we broadly stated that under a *quid pro quo* theory "the plaintiff-employee must establish that she was *denied an economic benefit* either because of gender or because a sexual advance was made by a supervisor and rejected by her." 957 F.2d at 62 (emphasis added). *Kotcher*, however, was a hostile work environment case, not a *quid pro quo* case; hence, the quoted language is, at best, dictum.

Carrero was a *quid pro quo* case, and there we did say: "The gravamen of a quid pro quo claim is that a tangible job benefit or privilege is conditioned on an employee's submission to sexual blackmail and that *adverse consequences* follow from the employee's refusal." 890 F.2d at 579 (emphasis added). *Carrero*, however, was a "refusal" case, not a "submission" case;

accordingly, as one might expect, the job-related consequences of Carrero's refusal were both obvious and "adverse." Consistent with the *prima facie* case outlined above, Carrero satisfied Title VII because her supervisor made decisions affecting her employment based on her response to his sexual advances. We read *Carrero's* reference to "adverse consequences," therefore, as descriptive of the facts before the Court, not as establishing a *sine qua non* that employment decisions be "adverse" in order to state a valid claim. Accordingly, there is no inconsistency between *Carrero* and our conclusion that once an employer conditions any terms of employment upon the employee's submitting to unwelcome sexual advances, a *quid pro quo* claim is made out, regardless of whether the employee (a) rejects the advances and suffers the consequences, or (b) submits to the advances in order to avoid those consequences.

Finally, we believe imposing an "actual economic loss" requirement in a *quid pro quo* case where the employee submits to the unwelcome sexual overtures of her supervisor places undue emphasis on the victim's response to the sexual harassment. The focus should be on the prohibited conduct, not the victim's reaction. While the employee's submission to the supervisor's advances is certainly relevant, it bears only on the issue whether the sexual advances were unwelcome, not whether unwelcome sexual advances were unlawful. *See Meritor*, 477 U.S. at 68 ("The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome...."). Ultimately, the question whether Karibian submitted to Urban's advances out of a reasonable fear of some job-related reprisal is properly one for the finder of fact. Because the district court erroneously removed this central question from the factfinder by the grant of summary judgment, we reverse.

II. *Columbia's Liability for Hostile Work Environment*

Karibian also contends that the district court erred when it held that Columbia could be liable under a hostile work environment theory only if she satisfied the standard applied in *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59 (2d Cir. 1992). In *Kotcher*, we said that the plaintiff must prove that the employer "either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it." 957 F.2d at 63. Karibian contends that this standard is not applicable to all claims of hostile work environment, and that a different standard obtains here. Columbia responds that the standard described in *Kotcher* governs an employer's liability in this and *every* hostile work environment case. Again, Karibian has the better argument.

A hostile work environment exists "[w]hen the work place is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment,'" *Harris*, 114 S.Ct. at 370 (quoting *Meritor*, 477 U.S. at 65, 67). Whereas liability for *quid pro quo* harassment is always imputed to the employer, a plaintiff seeking to establish harassment under a hostile environment theory must demonstrate some specific basis to hold the employer liable for the misconduct of its employees. *Kotcher*, 957 F.2d at 62. Unfortunately, the "specific basis" of employer liability for a hostile work environment remains elusive.

In *Meritor*, the Supreme Court declined to announce a definitive rule on employer liability in hostile work environment cases. *Meritor*, 477 U.S. at 72. *Meritor* did, however, make two things clear: employers are not always liable for the hostile work environment created by their employees. *Id.* And, lack of notice and the existence of complaint procedures do not automatically insulate an employer from liability. *Id.* Beyond these alpha and omega rules, the Court declined to offer further enlightenment. Instead, we are instructed to be guided by common-law principles of agency. *Id.*

A rule of employer liability deriving from traditional agency principles cannot be reduced to a universal, pat formula. It will certainly be relevant to the analysis, for example, that the alleged harasser is the plaintiff's supervisor rather than her co-worker. *See, e.g., Kauffman v. Allied Signal, Inc., Autolite Div.*, 970 F.2d 178, 183 (6th Cir.) (contrasting standard of employer liability in cases of co-worker harassment from that applicable in cases of supervisor harassment), *cert. denied*, 113 S. Ct. 831 (1992); *Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 604 (7th Cir. 1985) (suggesting that a notice requirement may be necessary in cases of co-worker harassment, but not in cases of harassment by supervisors). Yet, even such a distinction will not always be dispositive. For example, we held in *Kotcher*, that the employer was not liable for the hostile work environment caused by the plaintiff's supervisor absent notice or the failure to provide a reasonable avenue for complaint. 957 F.2d at 63. We went on to caution, however, that we were not dealing in absolutes and that the *Kotcher* rule would not necessarily apply in all cases; we noted, for example, that "[a]t some point... the actions of a supervisor at a sufficiently high level in the hierarchy would necessarily be imputed to the company." *Id.* at 64.

We have not yet had occasion to address the proper standard of employer liability where, as here, the plaintiff's supervisor created a discriminatorily abusive work environment through the use of his delegated authority. Common law principles of agency suggest that in such circumstances the employer's liability is absolute.

The Restatement of Agency notes that an employer will be liable for the torts of its employees committed "while acting in the scope of their employment," or, if not acting in the scope of employment, if the employee "purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." *Restatement (Second) of Agency* § § 219 (1) & (2)(d)

(1958). Hence, when a supervisor makes employment decisions based on an employee's response to his sexual overtures, it is fair to hold the employer responsible because "the supervisor is acting within at least the apparent scope of the authority entrusted to him by the employer." *Henson*, 682 F.2d at 910.

We hold that an employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship. *See Restatement (Second) of Agency* § 219 29 C.F.R. § 1604.11(c); *see also Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572, 579 (10th Cir. 1990); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1559-60 (11th Cir. 1987); *Watts v. New York City Police Dep't*, 724 F.Supp. 99, 106 n. 6 (S.D.N.Y. 1989). In contrast, where a low-level supervisor does not rely on his supervisory authority to carry out the harassment, the situation will generally be indistinguishable from cases in which the harassment is perpetrated by the plaintiff's co-workers; consequently, the *Kotcher* standard of employer liability will generally apply, and the employer will not be liable unless "the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it." *Kotcher*, 957 F.2d at 63. *See* 29 C.F.R. § 1604.11(d); *see also Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1189 (2d Cir. 1987); *Snell v. Suffolk County*, 782 F.2d 1094, 1104 (2d Cir. 1986). *Cf. Hirschfeld*, 916 F.2d at 579 (employer not liable absent evidence that supervisor "ever invoked [his] authority in order to facilitate his harassment of plaintiff").

Applying these principles, we agree with Karibian that Columbia would be liable for Urban's alleged harassment regardless of the absence of notice or the reasonableness of Columbia's complaint procedures. The essence of Karibian's hostile work environment claim is that her supervisor capitalized upon his authority over her employment to force her to endure a prolonged, violent and

demeaning sexual relationship. If the factfinder accepts Karibian's allegations, Columbia is liable to Karibian because Urban abused his delegated authority to create a discriminatorily abusive work environment.

Our conclusion that Columbia would be liable on a hostile environment claim for the harassment alleged by Karibian follows naturally from our earlier conclusion that Karibian stated a valid claim for *quid pro quo* harassment. Under the latter, courts have universally held employers liable for the actions of the supervisor because "[t]he supervisor is deemed to act on behalf of the employer when making decisions that affect the economic status of the employee. From the perspective of the employee, the supervisor and the employer merge into a single entity." *Kotcher*, 957 F.2d at 62. *See also Carrero*, 890 F.2d at 579 ("in *quid pro quo* cases the harassing employee acts as and for the company, holding out the employer's benefits as an inducement to the employee for sexual favors"); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989) ("When a supervisor requires sexual favors as *quid pro quo* for job benefits, the supervisor, by definition, acts as the company."); *Henson*, 682 F.2d at 910 (in a *quid pro quo* case, "the supervisor uses the means furnished to him by the employer to accomplish the prohibited purpose"). It would be a jarring anomaly to hold that conduct which always renders an employer liable under a *quid pro quo* theory does not result in liability to the employer when that same conduct becomes so severe and pervasive as to create a discriminatorily abusive work environment.

Columbia argues that holding it liable for Urban's harassment is contrary to the standard of employer liability we applied in *Kotcher*. We disagree. In *Kotcher*, the gist of the plaintiff's hostile work environment claim was that her supervisor subjected her to repeated vulgar comments and gestures. 957 F.2d at 61. We held that the employer would not be liable for the supervisor's misconduct unless the employer provided no reasonable avenue for complaint, or

unless it knew of the supervisor's misconduct but did nothing about it. 957 F.2d at 63. As support for this standard of liability, we relied on *Snell v. Suffolk County*, 782 F.2d 1094, 1104 (2d Cir. 1986), in which the harassment was perpetrated by the plaintiff's co-workers. In both *Kotcher* and *Snell* we simply applied the law of agency to the facts before us and concluded that liability for the misconduct alleged could not be imputed to the employer. In neither *Kotcher* nor *Snell*, however, did the harasser use his actual or apparent authority to further the harassment alleged. Thus understood, our holding today is complementary to *Kotcher*, not inconsistent with it.

CONCLUSION

The judgment of the district court granting summary judgment on Karibian's Title VII claim is reversed and the matter is remanded for further proceedings consistent with this opinion. Because we reinstate Karibian's federal claim, the judgment dismissing Karibian's pendent state law claims for lack of jurisdiction is reversed as well. Finally, Columbia's request for an order directing Karibian to share the cost of supplemental appendix is denied.

REVERSED and REMANDED.

APPENDIX B

United States District Court

SOUTHERN DISTRICT OF NEW YORK

SHARON KARIBIAN,

Plaintiff,

- against -

COLUMBIA UNIVERSITY, JOHN BORDEN and MARK URBAN,

Defendants.

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91 Civ. 3135 (TPG)

OPINION

This is a sexual harassment case. There is a claim against Columbia University under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. There are also various claims against Columbia under state law theories. Defendants Borden and Urban are sued solely under state law theories.

Defendants Columbia and Borden move for summary judgment. The motion is granted. For reasons hereafter set forth, the Title VII claim against Columbia must be dismissed because there is no triable issue of fact. As to the state law claims against Columbia and the claims against Borden, there is no jurisdiction after dismissal of the Title VII portion of the action.

Although Urban has not made a motion, the court dismisses the action against him on its own motion, for lack of jurisdiction.

FACTS

In late 1986 while plaintiff was a student at Columbia, she obtained part-time employment with the University. The office she worked at was called "Telefund at Columbia University." Although it was part of the University, its activities were to some extent designed and administered by a separate company called Philanthropy Management, Inc. ("PMI"). The people working at Telefund consisted of both Columbia University employees and PMI employees. Telefund operated under the aegis of an entity at Columbia called University Development and Alumni Relations ("UDAR").

Defendant Urban was employed by Columbia University commencing in September 1987. He worked in UDAR and his duties included responsibility for Telefund. Borden was Deputy Vice President of UDAR from April 1, 1988 until sometime in 1991. He was Urban's superior.

Plaintiff alleges that she met Urban in the spring of 1987, before Urban went to work for Columbia. She alleges that Urban pressured her into having sexual relations commencing shortly after they met and continuing through 1989.

Columbia has an established mechanism for dealing with sexual harassment. Columbia publishes a bulletin entitled "Protection Against Sexual Harassment." The bulletin starts with a Policy Statement, which includes the unequivocal declaration the "the University prohibits sexual harassment of any member of the Columbia community." The bulletin describes remedies provided by the University. A person who believes that he or she is being sexually harassed is invited to confer with a member of the University Panel on Sexual Harassment. There is also provision for the aggrieved party (or the panel member with permission of the aggrieved party) to discuss the problem with the University's Office of Equal Opportunity and Affirmative Action ("EOAA"). Finally,

the party alleging sexual harassment may file a grievance under the applicable University grievance procedure.

It is agreed by both sides that the first two steps - *i.e.*, resort to the University Panel on Sexual Harassment or resort to the EOAA - are entirely confidential. This means that there is no effort to investigate the matter or to obtain a remedy against the alleged guilty party. The grievance procedure, on the other hand, is not confidential and sets in motion an investigation and other steps which may lead to remedial action against the party complained of.

During September 1988 plaintiff consulted with one of the members of the Sexual Harassment Panel and also with an employee at the EOAA. Plaintiff concedes that she knew that these consultations were confidential. The EOAA employee has stated, without contradiction, that plaintiff specifically requested that there be no investigation at that time. The sexual relations between plaintiff and Urban continued.

Plaintiff claims that in April 1989, after Urban allegedly forced her to perform a sexual act, she related this incident to Loren Spivack, an employee of PMI. Plaintiff asserts that Spivack informed her that he had relayed the information to the president of PMI, Ron Erdos. Plaintiff goes on to assert her belief that Erdos in turn reported the incident to defendant Borden.

Plaintiff's statement under Local Civil Rule 3(g) alleges that defendant Borden knew or should have known that plaintiff was subjected to sexual harassment since at least April 1989. Borden's 3(g) statement asserts that he did not learn about plaintiff's complaint until 1990.

It should be noted that the presentations of all parties on the motion for summary judgment are based mainly on the extensive depositions taken in the case.

No deposition of Spivack or Erdos was taken. At least, there is no reference to such deposition testimony in the present motion. Borden's deposition was taken. Plaintiff's attorney asked Borden if he knew about a "nonbusiness relationship" between plaintiff and Urban, to which Borden replied that, when Urban recommended plaintiff for a promotion in late August 1989, Urban said that he and plaintiff had dated but that they were no longer dating. Borden testified that he learned nothing further until January 1990.

Thus there is no support in Borden's deposition or in any other evidence for the idea that Borden learned of the problem in April 1989. Plaintiff's proposition to this effect is entirely speculative.

After April 1989 sexual relations between plaintiff and Urban continued. On January 30, 1990 plaintiff met with Gertrude de la Osa, Director of Development Services at UDAR and complained about sexual harassment by Urban. The matter was promptly reported by de la Osa to Borden. An investigation was immediately conducted by Borden with the assistance of the Office of General Counsel of the University.

By early March Urban was relieved of any supervisory role with respect to plaintiff. In April 1990 Urban's resignation was requested and given. He left the University at that time.

DISCUSSION

A sexual harassment claim under Title VII may be based on either of two theories: (1) "quid pro quo" or (2) hostile work environment. *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64-65 (1986).

In order to prevail on a quid quo pro theory, the plaintiff must show an actual — rather than threatened — economic loss because of gender or because a sexual advance was made and rejected. Plaintiff produces no evidence demonstrating that she was denied an economic benefit. In fact, during the period of the alleged

harassment, plaintiff was promoted from clerical worker to Project Director of Telefund. Her salary also increased. The court finds that there is no indication of any valid claim under the quid pro quo theory.

The allegations under the hostile environment theory must be dealt with in more detail. In the motion for summary judgment, Columbia does not attempt to disprove the allegations of misconduct against Urban. Columbia's position is that, even if Urban committed the misdeeds alleged, Columbia is not liable.

The Supreme Court has not established a definitive rule for employer liability, but has directed lower courts to draw from traditional agency principles. *Vinson*, 477 U.S. at 72. The Second Circuit has interpreted this guideline to mean that a plaintiff must prove "that the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it." *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59, 63 (2d Cir. 1992).

There is no basis for any contention that Columbia University failed to provide a reasonable avenue for making complaints. The only possible ground for holding Columbia liable is that it knew of the misconduct of Urban and failed to take remedial steps.

In this connection, plaintiff contends that Columbia knew of the sexual harassment in September 1988, at the time of her consultations with the Sexual Harassment Panel and with the EOAA. Plaintiff contends that, despite this knowledge, Columbia did nothing about the problem. Plaintiff further contends that Columbia knew about the difficulty in April 1989 when she described it to Spivack of PMI. Plaintiff contends that again Columbia failed to perform its duty to take remedial action.

The information which certain Columbia employees learned in September 1988 was obtained in the course of consultations which were intended to be completely confidential. It cannot be said that

this was "knowledge" on the part of Columbia of the kind that gave Columbia the duty to inquire and take remedial action. Plaintiff chose these confidential procedures instead of availing herself of the right, offered by the University, to file a grievance and initiate an investigation leading to a possible remedy against Urban. Columbia could hardly be expected to act against Urban as a result of the confidential consultations of September 1988.

In connection with plaintiff's claim that Columbia should have taken action in April 1989, the essential fact is that plaintiff spoke to an employee of a separate company, PMI, and did not speak to anyone at Columbia. Despite an extensive deposition record, there is absolutely no evidence that any PMI employee notified Borden or anyone else at Columbia of what plaintiff said.

Plaintiff contends that notice to PMI was the equivalent of notice to Columbia, and that PMI's knowledge should be taken to be the knowledge of Columbia. The court rejects this theory. PMI was a small company performing a service as an independent contractor to Columbia. It was not responsible for policing the problems arising between one Columbia University employee and another. If PMI had reported the matter, it would have involved going over Urban's head to someone such as Borden, and relaying a complaint about Urban. Perhaps this would have been a worthy thing to do, but PMI had no legal duty to do so, and indeed had economic reasons for minding its own business.

But overriding all of this is the salient fact that plaintiff had the ability in April 1989 or at any time to go directly to Columbia with her complaint. She did not have to rely on the uncertain, indirect channel of PMI. Under all the circumstances, the court rules that notice to PMI was not notice to Columbia and that PMI's knowledge was not the knowledge of Columbia. The events of April 1989 did not impose on Columbia any duty to take remedial action against Urban.

The first time that plaintiff made a complaint of such a nature as to require action on the part of Columbia was in late January 1990. When this occurred Columbia took prompt and effective remedial action. Within a reasonable time plaintiff was removed from Urban's supervision. Shortly thereafter Urban's employment was terminated.

The court rules that Columbia had no duty to investigate, or to take remedial action, until plaintiff made her complaint in late January 1990. Columbia's response to that complaint was prompt and effective. Columbia has demonstrated that it is not liable under Title VII and that there is no triable issue of fact on this claim.

Brief note must be made of a retaliation claim of plaintiff. It appears that plaintiff was terminated in August 1990 along with all other employees working on the Telefund operation. Plaintiff makes a conclusory, totally unsupported allegation that this was in retaliation for her sexual harassment complaint. Columbia has produced conclusive evidence that the Telefund program was cancelled for independent business reasons. The evaluation of the Telefund operation had been going on since the summer of 1989 and in the summer of 1990 a UDAR employee named Veronica Chappelle recommended that the Telefund operation be ended.

In late 1990 Columbia accepted the offer of a different company than PMI to make Columbia a demonstration site for computerized telephone fund raising. This project was developed at no cost to Columbia. Plaintiff admits that she reviewed certain published public listings of job openings for this project, but did not apply.

CONCLUSION

Columbia is entitled to summary judgment dismissing the Title VII claim.

The only basis for jurisdiction over the other claims against Columbia is the doctrine of pendent jurisdiction. All the claims

against Borden and Urban are before the court solely on the basis of pendent jurisdiction.

Since the Title VII claim against Columbia is dismissed, there is no basis for asserting jurisdiction over the remaining claims.

The action is dismissed in its entirety.

SO ORDERED.

Dated: New York, New York
February 2, 1993

S/Thomas P. Griesa
U.S.D.J.

APPENDIX C

United States District Court

SOUTHERN DISTRICT OF NEW YORK

SHARON KARIBIAN,

Plaintiff,

-against-

COLUMBIA UNIVERSITY, JOHN BORDEN and MARK URBAN,

Defendants.

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91 CIVIL 3153 (TPG)

JUDGMENT

Defendants having moved for summary judgment, and the said motion having come before the Honorable THOMAS P. GRIESA, U.S.D.J., and the Court thereafter on February 2, 1993, having rendered its opinion (#71006); dismissing the action as against Mark Urban on the Court's own motion for lack of jurisdiction, and granting the motion, and dismissing the action in its entirety, it is,

ORDERED, ADJUDGED AND DECREED: That defendants Columbia University and John Borden's motion for summary judgment be and it is hereby granted, and it is further,

ORDERED, that the action be and it is hereby dismissed for lack of jurisdiction as against Mark Urban on the Court's own motion, and it is further,

ORDERED, that the action be and it is hereby dismissed in its entirety for the reasons stated in the Court's Opinion, dated February 2, 1993.

Dated: New York, New York
February 4, 1993

S/James M. Parkinson
Clerk

United States District Court

SOUTHERN DISTRICT OF NEW YORK

SHARON KARIBIAN,

Plaintiff,

-against-

COLUMBIA UNIVERSITY, JOHN BORDEN and MARK URBAN,

Defendants.

91 CIVIL 3135 (TPG)

AMENDED JUDGMENT

Defendants moved for summary judgment. The court rendered its opinion of February 2, 1993. A judgment based on that opinion was entered on February 4, 1993. Certain clerical errors were made in that judgment, resulting in this amended judgment as follows.

It is noted that plaintiff asserted a claim under Title VII of the Civil Rights Act of 1964 against defendant Columbia University. Plaintiff also asserted claims under state law against Columbia University. The claims against John Borden and Mark Urban were solely under state law.

It is ordered and adjudged that defendant Columbia University's motion for summary judgment dismissing the Title VII claim is granted.

It is order and adjudged that the claims under state law — that is, the remaining claims against defendant Columbia University and

all the claims defendants against Borden and Urban — are dismissed for lack of jurisdiction.

The entire action is dismissed.

Dated: New York, New York
December 22, 1993

S/Thomas P. Griesa
U.S.D.J.

APPENDIX D

EXCERPTS, TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. §§ 2000e, et seq.

SUBCHAPTER VI—EQUAL EMPLOYMENT OPPORTUNITIES

§2000e. Definitions

For the purposes of this subchapter —

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501 (c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

* * * *

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

* * * *

§ 2000e-2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * *

§ 2000e-5. Enforcement provisions

* * * *

Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing expedition of case; appointment of master

(f) (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has

not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final

disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Relief available

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the emplcyer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

APPENDIX E

New York Labor Law

§ 201-d (McKinney 1994)

§ 201-d. Discrimination against the engagement in certain activities

1. Definitions. As used in this section:

a. "Political activities" shall mean (i) running for public office, (ii) campaigning for a candidate for public office, or (iii) participating in fund-raising activities for the benefit of a candidate, political party or political advocacy group;

b. "Recreational" activities shall mean any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material;

c. "Work hours" shall mean, for purposes of this section, all time, including paid and unpaid breaks and meal periods, that the employee is suffered, permitted or expected to be engaged in work, and all time the employee is actually engaged in work. This definition shall not be referred to in determining hours worked for which an employee is entitled to compensation under any law including article nineteen of this chapter.

2. Unless otherwise provided by law, it shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of:

a. an individual's political activities outside of working hours, off of the employer's premises and without use of the employer's equipment or other property, if such activities are legal, provided, however, that this paragraph shall not apply to persons whose employment is defined in paragraph six of subdivision (a) of this section seventy-nine-h of the civil rights law, and provided further that this paragraph shall not apply to persons who would otherwise be prohibited from engaging in political activity pursuant to chapter 15 of title 5 and subchapter III of chapter 73 of title 5 of the USCA;

b. an individual's legal use of consumable products prior to the beginning or after the conclusion of the employee's work hours, and off of the employer's premises and without use of the employer's equipment or other property;

c. an individual's legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property; or

d. an individual's membership in a union or any exercise of rights granted under Title 29, USCA, Chapter 7 or under article fourteen of the civil service law.

3. The provisions of subdivision two of this section shall not be deemed to protect activity which:

a. creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest;

b. with respect to employees of a state agency as defined in sections seventy-three and seventy-four of the public officers law respectively, is in knowing violation of subdivision two, three, four, five, seven, eight, or twelve of section seventy-three or of section seventy-four of the public officers law, or of any executive order, policy, directive, or other rule

which has been issued by the attorney general regulating outside employment or activities that could conflict with employees' performance of their official duties;

c. with respect to employees of any employer as defined in section twenty-seven-a of this chapter, is in knowing violation of a provision of a collective bargaining agreement concerning ethics, conflicts of interest, potential conflicts of interest, or the proper discharge of official duties;

d. with respect to employees of any employer as defined in section twenty-seven-a of this chapter who are not subject to section seventy-three or seventy-four of the public officers law, is in knowing violation of article eighteen of the general municipal law or any local law, administrative code provision, charter provision or rule or directive of the mayor or any agency head of a city having a population of one million or more, where such law, code provision, charter provision, rule or directive concerns ethics, conflicts of interest, potential conflicts of interest, or the proper discharge of official duties and otherwise covers such employees; and interest, potential conflicts of interest, or the proper discharge of official duties and otherwise covers such employees; and

e. with respect to employees other than those of any employer as defined in section twenty-seven-a of this chapter, violates a collective bargaining agreement or a certified or licensed professional's contractual obligation to devote his or her entire compensated working hours to a single employer, provided however that the provisions of this paragraph shall apply only to professionals whose compensation is at least fifty thousand dollars for the year nineteen hundred ninety-two and in subsequent years is an equivalent amount adjusted by the same percentage as the annual increase or decrease in the consumer price index.

4. Notwithstanding the provisions of subdivision three of this section, an employer shall not be in violation of this section where the employer takes action based on the belief either that: (i) the employer's actions were required by statute, regulation, ordinance or other governmental mandate, (ii) the employer's actions were permissible pursuant to an established substance abuse or alcohol program or workplace policy, professional contract or collective bargaining agreement, or (iii) the individual's actions were deemed by an employer or previous employer to be illegal or to constitute habitually poor performance, incompetency or misconduct.

5. Nothing in this section shall apply to persons who, on an individual basis, have a professional service contract with an employer and the unique nature of the services provided is such that the employer shall be permitted, as part of such professional service contract, to limit the off-duty activities which may be engaged in by such individual.

6. Nothing in this section shall prohibit an organization or employer from offering, imposing or having in effect a health, disability or life insurance policy that makes distinctions between employees for the type of coverage or the price of coverage based upon the employees' recreational activities or use of consumable products, provided that differential premium rates charged employees reflect a differential cost to the employer and that employers provide employees with a statement delineating the differential rates used by the carriers providing insurance for the employer, and provided further that such distinctions in type or price of coverage shall not be utilized to expand, limit or curtail the rights or liabilities of any party with regard to a civil cause of action.

7. a. Where violation of this section is alleged to have occurred, the attorney general may apply in the name of the people of the state of New York for an order enjoining or

restraining the commission or continuance of the alleged unlawful acts. In any such proceeding, the court may impose a civil penalty in the amount of three hundred dollars for the first violation and five hundred dollars for each subsequent violation.

b. In addition to any other penalties or actions otherwise applicable pursuant to this chapter, where a violation of this section is alleged to have occurred, an aggrieved individual may commence an action for equitable relief and damages.

(Added L.1992, c. 776, § 1; amended L.1992, c. 778, §§ 1,2.)